78-1293

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS K. STEWART,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

Petitioner prays that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court, First District entered on November 22, 1978, which denied Stewart's Petition for Rehearing from an Opinion entered on October 17, 1978.

OPINION BELOW

The opinion of the Illinois Appellate Court, First District affirming the denial of Stewart's Post Conviction Petition and the denial by the Illinois Supreme Court of Stewart's Motion to Extend Time to File a Petition for Leave

to Appeal are unreported and, therefore, are set out in full in the Appendix hereto.

A prior decision of the Illinois Appellate Court, First District affirming Petitioner's conviction is found at 24 Ill. App. 3d 605, 321 N.E.2d 450 (1974). The Illinois Supreme Court denied the Petition for Leave to Appeal from that decision at 58 Ill. 2d 595 (1975).

JURISDICTION

The opinion of the Illinois Appellate Court, First District was entered on October 17, 1978. Stewart's Petition for Rehearing, although not discovered until January 9, 1979, was denied on November 22, 1978.* The Illinois Supreme Court denied Stewart's Motion to Extend Time to File a Petition for Leave to Appeal on January 16, 1979. Therefore, we seek review pursuant to Title 28 USC, §1257 —a substantial federal question is involved.

QUESTIONS PRESENTED

1. Is Procedural Due Process violated when a State Attorney General takes over an appeal from a local prosecutor and renounces a confession of error made by the local prosecutor in the trial court?

2. Can a defendant's post conviction relief request be denied and affirmed on appeal on grounds that even if he wasn't guilty of armed robbery—the offense for which he was indicted and tried—he was guilty of conspiracy on theories of accountability?

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* A copy of the order which, also expunged a portion of the opinion is set out in the Appendix.

CONTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The facts of this case were fully set out in the Application For a Stay of Mandate Pending the Filing of a Petition Seeking Issuance of a Writ of Certiorari to The Illinois Supreme Court and Illinois Appellate Court, First District, No. A-658 which was denied on January 23, 1979, by Mr. Justice Stevens and, also, by Mr. Justice Brennan on January 24, 1979. That Application is fully set out in the Appendix.

REASONS FOR GRANTING THE WRIT

I.

IT IS A VIOLATION OF DUE PROCESS FOR THE ILLINOIS ATTORNEY GENERAL TO TAKE OVER AN APPEAL AND RENOUNCE A CONFESSION OF ERROR MADE IN THE TRIAL COURT BY THE STATE'S ATTORNEY OF COOK COUNTY

On February 8, 1979, Bernard Carey in a letter* to Petitioner stated that: "The quotation attributed to me in the DAILY NEWS article of July 9, 1976,** correctly reflected my view of your case." What Mr. Carey did not state is that it was incumbent on him, as a matter of due process, to maintain his Confession of Error in the Appellate Court or renounce it himself. He did not do this; instead, he turned the appeal over to William J. Scott, the Illinois Attorney General,*** who, in turn, renounced Carey's Confession of Error. The Attorney General's position was adopted by the Illinois Appellate Court, First District. We submit that this procedure was fundamentally unfair and in violation of Petitioner's Due Process Rights under the Fourteenth Amendment.

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* That letter and Petitioner's letter of January 24, 1979, are set out in the Appendix.

** That article is set out in the Appendix.

***We contended, and still maintain, that under Illinois law it was improper for a State's Attorney, who is constitutionally authorized to maintain appeals for prosecutions within his territorial boundaries, to "turn over" an appeal to the Attorney General.

II.

STEWART'S POST CONVICTION REQUEST FOR A NEW TRIAL CANNOT BE DENIED ON GROUNDS THAT HE WAS VICARIOUSLY RESPONSIBLE FOR AN ARMED ROBBERY WHEN HE WAS INDICTED, TRIED AND CONVICTED FOR BEING THERE

Thomas Stewart was indicted, tried and convicted of armed robbery for which he received a 2-8 year sentence. He was indicted, tried and convicted for *being there*. See, *People* v. *Stewart,* 24 Ill. App. 3d 605, 321 N.E.2d 450 (1974).

Stewart's post conviction proceeding sought a new trial based on newly discovered evidence which proved, beyond doubt, that his alibi defense was true. His request for a new trial was denied by the trial judge on grounds, *inter alia,* that he was guilty of conspiracy or on grounds of vicarious accountability, even if he wasn't at the *locus* of the robbery.

It is fundamental that one cannot be convicted of that for which he wasn't indicted. *Cole* v. *Arkansas,* 333 U.S. 196; *Re Oliver,* 333 U.S. 257; *De Jonge* v. *Oregon,* 299 U.S. 353. Here, not only was Petitioner not indicted on a conspiracy or accountability theory, he was *tried* for *being there.*

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

SHELDON R. WAXMAN
30 W. Washington St.—Ste. 1115
Chicago, Illinois 60602
Tel. (312) 782-1360

APPENDIX

APPENDIX

7/9/76 Daily News

Carey attacks judge's denial of a new trial

State's Atty. Bernard Carey Friday criticized a judge's action in denying a new trial to a man convicted of taking part in a 1970 armed robbery of four priests at Our Lady of the Mount Church, Cicero.

The June 25, 1970, armed robbery, in which about $1,000 was taken, became shrouded in controversy after the convicted man, Thomas K. Stewart, said two policemen were involved in the crime.

Stewart, 25, a former member of the Legion of Justice, a right-wing group, contended his original lawyer in the case, the late S. Thomas Sutton, failed to present evidence that Stewart did not take part in the crime.

"Stewart's motion that he was not fairly represented could not be properly rebutted by our office," said Carey. ". . . We are convinced that Stewart should have been given an opportunity for such representation and the motion for a new trial should have been granted."

Carey said the action of Circuit Court Judge Robert A. Meier III, who denied the motion Thursday, was "surprising . . . in view of the motion and the position of the state's attorney's office."

Asst. State's Atty. Joseph Claps, in a confession of error filed with Meier June 15, admitted Stewart failed to receive adequate representation by his lawyer at the trial in 1971, when he was sentenced to two to eight years in prison.

Stewart contended Sutton, founder of the Legion of Justice, withheld evidence to protect the two policemen and others involved in the crime. The Legion of Justice, once closely linked with the Chicago police intelligence unit, planned the church invasion, according to court testimony.

Meier gave no reasons for denying Stewart's motion for a new trial. He gave Louis Leider, attorney for Stewart, until Aug. 8 to file a notice of appeal on the ruling.

Thomas K. Stewart

Box F, Chicago Ridge, Illinois 60415

January 24, 1979

Honorable Bernard Carey
State's Attorney-Cook County
2600 S. California
Chicago, IL 60608

Dear Mr. Carey:

I was saddened by the fact that you did not bother to respond to my last letter. I would have thought that you would have at least had one of your assistants acknowledge it.

As you know I will shortly be spending the next 2-8 years of my life in the Illinois penitentiary for something I did not do. You yourself said that in the interest of justice I should receive a new trial. Now you are silent. You are supposed to represent all of the people of the state of Illinois. If you really meart what you said you should be doing something to see that I do receive a new trial.

If on the other hand you were just making statements for the press, I think I should have been made aware of that so I would not have been misled by your statements and actions. I was gullible enough to beleive the people

in your office. I would still like to beleive that your office is one of integrity but everything that has been done up to now makes it impossible to still beleive this.

It seems that just as I was misled by Mr. Sutton, I was also duped by the assistants in your office. If I lied, I should be indicted for perjury. If Sedlacko lied, he should be indicted for perjury and brought to trial for the robbery of Our Lady of the Mount Church since his immunity covers him only if he told the truth. On the other hand, if we told the truth as you know we did, *you have a legal and moral obligation to see that justice is done.* For you to close your eyes to a travesty of justice seems totally out of charracter for someone like yourself. That is unless your public image is just window dressing. I really hope that isn't the case.

Sincerely yours,

/s/ Tom Stewart
Tom Stewart

cc:file

(Seal)

County of Cook
Offiec of the State's Attorney
Chicago 60602

Bernard Carey
State's Attorney

February 8, 1979

Mr. Thomas K. Stewart
Box F
Chicago Ridge, IL 60415

Dear Mr. Stewart:

I have received your letters of January 11, 1979 and January 24, 1979, and have reviewed the circumstances of your case. The press of business prevented mc from responding sooner.

The quotation attributed to me in the DAILY NEWS article of July 9, 1976, correctly reflected my view of your case. I expressed this view before Judge Robert Meier in written Confession of Error. My opinion in this matter has not changed. If it were my decision to make, I would approve a new trial for you wherein you would be represented by an attorney unemcumbered by any conflict of interest. However, the decision is not mine to make.

Once a case has been decided on its merits, the prosecutor cannot overturn the court's decision. At best, if convinced that an injustice has occurred, a prosecutor can confess error to the court wherein the case was tried. The court is not bound to accept that confession of error.

In your case, regrettably, Judge Meier rejected our Confession of Error. As you know, the Appellate Court agreed with Judge Meier. There is nothing more that I can do to affect the judgment entered against you or the sentence imposed upon you.

However, I still stand by what I said in July, 1976 and if requested, would present that view to the Prisoner Review Board.

Very truly yours,

/s/ Bernard Carey
BERNARD CAREY
State's Attorney

BC:mw

No. A-658

May it please the Justice, this Application is sought by Sheldon R. Waxman, a Member of the Bar of this Court, the Bar of the Seventh Federal Circuit, and the Bar of the State of Illinois on behalf of Thomas K. Stewart for the following reasons:

1. In 1971, Thomas K. Stewart, a sub-operative of the infamous Nixon "Whitehouse Plumbers," deriving authority through an attorney, S. Thomas Sutton, was a member of what was "known" as the Legion of Justice. The Legion of Justice and its sub-branch, Operation Crescent, were fronts for the paramilitary operations ordered by Sutton on orders from "his friends."*

2. On October 13, 1971, Stewart was convicted of "robbing" Our Lady of the Mount Church in Cicero, Illinois (hereafter "OLM") on a Thursday evening. Stephen Sedlacko was a co-Defendant. He "skipped" the jurisdiction and "jumped" bond before Stewart's trial.

3. Facts disclosed at Stewart's trial, and in the subsequent Post Conviction Proceeding involved here, indicate that Sedlacko, a former member of the Army, had been involved in the "Phoenix" program in Viet Nam prior to joining the Legion of Justice. He was the one who supervised the "robbery."** He stated that he had entered into the rectory at OLM dressed in priest's clothes and then had a beer with the priest in charge. Thereafter Sedlacko "pulled" a submachine gun on the priest. He then opened

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* This is how Sutton referred to his Washington, D.C. contacts, e.g. G. Gordon Liddy.

** The purpose of the "robbery" was to obtain records related to the "conspiracy 7," defense. Cover for the operation was to be that the "left wing" OLM was to be "liberated" by a "right wing" priest, a member of Operation Crescent.

the door for his accomplices to join him. It was alleged at the trial that Stewart was among these. (See Ex. A for excerpts of Sedlacko's testimony at the Post Conviction Hearing).

4. Stewart was represented at the trial by the same S. Thomas Sutton, head of the Legion of Justice, who participated in the planning of the OLM operation. The defense was alibi. Nothing about Legion of Justice activities came out during the trial, which resulted in Stewart's conviction for armed robbery—no conspiracy or joint venture was ever alleged by the prosecutor at the trial, as later confessed by Bernard Carey, State's Attorney of Cook County. No other perpetrator, besides Stewart and Sedlacko, has ever been arrested. In 1974, this conviction was affirmed by the Illinois Appellate Court, 24 Ill. App. 3d 605, 321 N.E.2d 450, a decision which Judge Leighton recently characterized as "one of the most difficult cases I had to deal with," based, as it was, on the flimsiest of eyewitness identification.

5. In fact, Stewart was not present at the OLM "robbery" because he was involved in another operation to obtain documents from the local Y.S.A. (Young Socialist Alliance) office which was carried out on the following day, a Friday. None of this, of course, surfaced during Stewart's trial because of Sutton's admonitions not to disclose Legion activities.

6. Moreover, Stewart had been set up for a "fall," although he didn't know it until years later. Sutton, as later testimony revealed, had told the leader of the OLM operation, Sedlacko, prior to Stewart's trial, to flee the jurisdiction, even though Sedlacko wanted to testify that Stewart was not with him that Thursday evening. Sutton told Sedlacko that because Stewart wasn't at OLM, he would be acquitted for lack of identification and alibi. After this acquittal, the heat would be off and Sedlacko could return.

Sedlacko was given a CIA telephone contact by Sutton (See Ex. A).

7. The paramilitary operations of the Legion of Justice also involved agents of the Chicago "Red Squad" and federal agencies, including the 113th Military Intelligence Unit of the Army, which was based in Evanston, Illinois. See, *ACLU* v. *Westmoreland,* 323 F.Supp. 1153 (N.D. Ill. 1971), *aff'd., ACLU* v. *Laird,* 463 F. 2d 499, Modified on Rehearing, (7th Cir. 1972).*

8. Stewart assumed, because of his lack of knowledge of the "true facts, later testified to by Sedlacko, that he would be "taken care of" by the "system." Sutton had "beaten" many "raps" for himself and other Legion members. He had "clout." Stewart, who was of a young and impressionable age, was completely under the influence of Sutton and his references to "his friends." Because of this trust, Stewart has been under a wrongful sentence of 2-8 years in the penitentiary since 1971.

9. After Stewart's conviction had been affirmed on Appeal, Sedlacko was arrested in Arizona and extradited to Illinois on the "fugitive warrant" against him in December, 1974.

10. As part of the Post Conviction Proceeding which lasted one year, from July 9, 1975 to July 8, 1976, Sedlacko and others testified about the "true" facts. Also, testimony was being provided simultaneously with that which 71 witnesses were providing to a Cook County Grand Jury Investigation known as No. 655—The Extended March, 1975 Grand Jury Investigation into "Police Spying." This Grand Jury issued a Report, dated November 10, 1975 con-

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* In fact, the military's activities were far broader and more insidious than was revealed in the transcripts which Your Honor reviewed in the *ACLU* v. *Laird* appeal; thereby a fraud upon Your Honor was committed. See, *Universal Oil Co.* v. *Root Mfg. Co.,* 328 U.S. 575 and *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U.S. 238.

demning the entire covert counter-intelligence apparatus, CIA, Military, Federal Investigative, local police and paramilitary "right wing" covers. See, Appendix to Supplemental and Reply Brief in the Appellate Court at Tab 3, submitted herewith.

11. During the Post Conviction Proceeding, police officers who were co-conspirators in all of the Legion of Justice activities were subpoenaed. "Special" Assistant Corporation Counsel—appointed by Mayor Daley—Warren Wolfson and Harry Busch, "took over" the proceeding on the pretext that they were contesting the "relevance" of the subpoenae served on the police officers.

12. It became clear that the City's defensive tactics to the testimony being provided to Grand Jury No. 655, implicating the police in Legion activities, was to attempt to distance themselves from the Legion of Justice and Sutton. This was especially necessary because of the filing of civil injunctive and damage suits in the U.S. District Court in Chicago, directed towards ending illegal activity against First Amendment political expression rights. E.g. *Alliance to End Repression, et al.* v. *O'Grady,* No. 74C 3268, *ACLU* v. *City of Chicago, et al.,* No. 75C 3295; *Chicago Lawyers Committee for Civil Rights Under Law* v. *City of Chicago,* No. 76C 1982; *Socialist Workers Party* v. *Legion of Justice,* No. 75C 3361, *Hampton* v. *City of Chicago et al.,* 484 F.2d 602 (7th Cir. 1973) *cert. denied,* 415 U.S. 917 on appeal before the 7th Circuit (argued but undecided) from District Court Docket No. 70C 1384. Other lawsuits in other parts of the United States are too numerous to list here, but among others, include the following:

Teague v. *Alexander,* No. 75-0416 (D.C.D.C.);
SWP v. *Attorney General of U.S.,* No. 73 Civ 3160 (S.D.N.Y.);
Black Panther Party v. *Levi, et al.,* No. 76-2205 (D.C.D.C.).

13. The "Machine" appointed Judge, Robert Meier III, at the time of the Post Conviction Proceeding, was being investigated for IRS violations and was represented in that investigation by Warren Wolfson; see Appendix at Tab 7. This made the Proceeding a mockery of justice—often Judge Meier took direct cues from either Wolfson or Busch or both. See Argument Heading V of the Supplemental and Reply Brief. Needless to say, Judge Meier denied the Post Conviction Petition.

14. This is the only known Illinois case in which a trial court refused a Confession of Error filed by the lawfully constituted prosecutor — the State's Attorney of Cook County.* The Confession of Error submitted to Judge Meier is set forth at Argument Heading IV A of Stewart's Supplemental and Reply Brief submitted herewith. See, also, footnote 6 at page 45 thereof. The Confession of Error requested that the trial court vacate its prior judgment of conviction on grounds that Sutton could not have effectively represented Stewart under the circumstances because Sutton was *in particeps criminus* along with Chicago police and Federal investigative and counter-intelligence agents. Stewart's conviction purported to be the only available cover for all this.

15. On Appeal to the Illinois Appellate Court, the most heavily "Machine" oriented court in the State of Illinois,

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* As Your Honor knows, Illinois does not have a unified prosecutor system. The State's Attorneys in Illinois' 102 counties are constitutionally charged with criminal jurisdiction within their territorial boundaries. Any jurisdiction of the Illinois Attorney General in a criminal case is derivative, if it exists. How the Illinois Attorney General "took over" this Appeal is an interesting story by itself. See, Argument Heading VI and VII of the Supplemental and Reply Brief for the proposition that the "take over" denied Stewart his Procedural Due Process Rights.

Judge Meier's decision was affirmed on October 27, 1978, ... Ill. App. 2d ..... (Docket No. 77-13), a copy of the opinion is hereto attached as Exhibit B. Startlingly, no mention is made in the decision that Red Squad or Federal Intelligence Agencies were involved.*

16. On November 8, 1978, Stewart filed his Petition for Rehearing and Motion to Expunge, copies of which are hereto attached as Exhibits C and D. The Petition "charts" the numerous omissions in the opinion.

17. Unknown to Stewart or Stewart's counsel, on November 22, 1978, the Appellate Court denied the Petition for Rehearing but at least partially granted the Motion to Expunge. (See copy of Order submitted as Exhibit E).

18. Counsel became aware of the existence of the aforesaid Order on January 9, 1979, after time for Leave to Appeal to the Illinois Supreme Court had expired. See, Exhibit F, *infra* for explanation of how this occurred.

19. On January 9, 1979, counsel filed a Motion for an Extension of Time to File a Petition for Leave to Appeal and For a Stay or Recall of Mandate in the Illinois Supreme Court. (*People* v. *Stewart,* Docket No. 51555) (See Exhibit F submitted herewith). At 4:30 P.M. on January 16, 1979, the Illinois Supreme Court denied the aforesaid Motion in both respects. See Order attached hereto as Exhibit G. Therefore, Stewart's right to appeal to the Illinois Supreme Court has been barred.

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* See attached Materials List of the Campaign for Political Rights, December, 1978 submitted herewith to show the commonplace acceptance of the factual validity of these allegations. Also, see authority listed under Argument Heading II of the Supplemental and Reply Brief and Chicago Reader Magazine Article entitled, "Confessions of a Red Squad Spy," August 25, 1978, also submitted herewith.

20. The Illinois Appellate Court, on advice of Gilbert Marchman, Clerk, has not yet issued its Mandate. Mr. Marchman is waiting for his Court to act on Stewart's Motion to Amend the Record on Appeal with Additional Transcripts of Proceedings and the Application for a Certificate of Importance which were filed together on January 9, 1979 (See, Exhibit F). Mr. Marchman has stated to Stewart's counsel that the Court has advised him that it will not provide any relief to Stewart to update its Order of November 22, 1978 so that an appeal can be taken to the Illinois Supreme Court. How the Illinois Appellate Court can grant Stewart's Application for a Certificate of Importance under these circumstances is doubtful.

21. This case involves important facts which have been suppressed by the judicial system for a long time and, also, federal constitutional issues concerning the Fifth and Sixth Amendments to the United States Constitution, which issues have been erroneously interpreted by the State Courts of Illinois. Those courts, therefore, have violated Stewart's Fourteenth Amendment Rights in the following areas:

(a) Sutton, Stewart's lawyer, set up Stewart to hide the nefarious activities of the Legion of Justice and "his friends" and, although Stewart knew some of the facts, he did not know that he had been set up. In fact, he wasn't present at the OLM operation. He is innocent. Moreover, he couldn't waive that which he didn't know, as revealed by Sedlacko's testimony at the Post Conviction Proceeding. *Fay* v. *Noiia,* 372 U.S. 391 (1963); *Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

(b) Judge Meier refused to enforce the subpoenae issued to the Chicago police officers. See, *U.S.* v. *Nixon,* 418 U.S. 683 (1974).

(c) Stewart has been convicted of "conspiracy" although he was not indicted nor tried for same. See,

Cole v. *Arkansas,* 333 U.S. 196; *Re Oliver,* 333 U.S. 257; *DeJonge* v. *Oregon,* 299 U.S. 353.

(d) The various State courts, by their actions and rulings, have denied "fundamental fairness" doctrines which would allow this case to get before a new jury to determine guilt especially that which has been newly discovered based on *all* of the evidence. See, *Brady* v. *Maryland,* 373 U.S. 83 (1963);

(e) The Appellate Court misconstrued Illinois Supreme Court standards on similar cases and the Illinois Supreme Court, by denying an extension of time, has *refused* to enforce its own Mandates. See *People* v. *Stoval,* 40 Ill. 2d 149, 263 N.E. 2d 441 (1968).

22. The foregoing are all issues which Stewart intends to bring formally before this Court in his Petition for Writ of Certiorari. The Petition will be filed on or before February 22, 1979, which is ninety days from issuance of the Illinois Appellate Court's Order of November 22, 1978, denying Stewart's Petition for Rehearing. We submit that the Illinois Supreme Court's Order of January 16, 1979 could be construed as commencing the running of time for the filing of the Petition in this Court.

23. Stewart has never moved from the Chicago Metropolitan area and has been on a $20,000. 10% bond since 1971. He has never attempted flight. He is now a respected member of the business community. If he is incarcerated, which will occur after the Appellate Court issues its Mandate (See paragraph 19 *supra*), his appeal to this Court will be adversely affected because of his inability to earn a livelihood to pay to carry on his fight for the truth. A request for a Stay to the Illinois Supreme Court has been denied on January 16, 1979.

24. Stewart has never requested a reduction of sentence which he would surely be entitled to, considering that "the Weathermen" have been released on non-reporting probation for the "grievous" offenses they committed—during the "Days of Rage" in Chicago.

WHEREFORE, Applicant respectfully requests that a Stay of Mandate or Recall of Mandate, if issued, be entered *pendente lite.* Exceptional circumstances have been shown. Mr. Stewart might not be safe in the penitentiary.

Respectfully submitted,

THOMAS K. STEWART

By: /s/ *Sheldon R. Waxman*
SHELDON R. WAXMAN
His Attorney and Member
of the Bar of this Court

Mr. JUSTICE DOWNING delivered the opinion of the court:

Thomas Stewart, defendant, was found guilty of armed robbery on November 29, 1971 after a jury trial in the criminal court of Cook County. He was sentenced to a term of two to eight years. On direct appeal we affirmed this conviction and sentence, *People* v. *Stewart* (1st Dist. 1974), 24 Ill. App. 3d 605, 321 N.E.2d 450. Leave to appeal to the Illinois Supreme Court was denied, *People* v. *Stewart* (1975), 58 Ill. 2d 595.

Defendant then filed a post-conviction petition which was later amended. After an evidentiary hearing before the same trial court judge, the amended petition was denied. It is from this judgment that defendant now appeals.

The issues on appeal are: (1) whether defendant was denied his constitutional right to effective assistance of counsel at the original trial; (2) whether the trial court erred in rejecting a confession of error made by the state's attorney of Cook County; and (3) whether the post-conviction hearing was conducted in such a manner as to deny defendant due process of law.

The detailed facts involved in the armed robbery are set forth in our first opinion, *Stewart, supra.* Briefly, defendant was convicted of the armed robbery at the rectory of the Our Lady of the Mount Catholic Church in Cicero, Illinois. A co-defendant in the original trial, Stephen Sedlacko, was never tried. Both were represented by the same trial attorney, S. Thomas Sutton. However, on the direct appeal, defendant was represented by attorney Louis M. Leider.

On April 19, 1975, defendant filed a petition for post-judgment relief under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1975, ch. 38, pars. 122-1 through 122-7) and

section 72 of the Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, par. 72). The petition was subsequently amended to also include a plea under the *Habeas Corpus* Act. (Ill. Rev. Stat. 1975, ch. 65, pars. 1 through 36.2.) In essence, the amended petition sought to set aside defendant's judgment and sentence on the following grounds: (1) that defendant's attorney at the trial level, S. Thomas Sutton, had planned the crime for which defendant was convicted, that Sutton represented both defendant and co-defendant, Sedlacko, and therefore defendant was denied his constitutional right to effective assistance of counsel; (2) that the failure of Chicago Police Officer Nolan to disclose to the prosecution evidence within the officer's control bearing upon defendant's innocence deprived him of due process of law; and (3) that these facts first became known in April or May of 1975.

In his amended petition, defendant alleged that the robbery at the church rectory was committed by persons acting on behalf of the Legion of Justice; that Sutton was significantly responsible for Legion activities and was the "master mind" of the robbery; that Sedlacko admitted under oath his participation in the rectory robbery with another whose physical characteristics were similar to those of defendant; that the defendant never participated in the robbery; that at Sutton's direction Sedlacko absented himself from the defendant's trial; that Chicago Police Officer Nolan, who at the trial identified a joint photograph of the defendant and Sedlacko, knew that defendant did not participate in the robbery; and that Sutton's conflict of interest in representing both defendant and Sedlacko was never fully disclosed to or understood by defendant, and that these facts first became known to defendant in April or May 1975.

At the time of the post-conviction hearing, attorney Sutton was deceased. Defendant's attorney served subpoenas

on four Chicago police officers to appear at the hearing. The trial court reserved ruling on a motion to quash the subpoenas by attorneys Harry J. Busch and Warren D. Wolfson who appeared as special assistant corporation counsel of the City of Chicago. The trial court, however, permitted attorneys Busch and Wolfson to participate in the hearing. These two attorneys took an active part in the hearing over the objection of the defendant. It does not appear in the record whether the state's attorney took a position with respect to this procedure. In any respect the hearing proceeded with the unusual cast of attorneys: the state's attorney, defendant's attorney, and two attorneys not representing a party in the action.

At the hearing, defendant testified that he was a member of the Legion of Justice, an organization of which Sutton was the leader and described as an intelligence organization that worked gathering information for a number of governmental agencies. Defendant admitted participating in the planning of the robbery with Sutton, Sedlacko, and police officer Nolan; that Nolan checked out the security system at the church and rectory; that the defendant did not participate in the robbery; that after he was indicted, Sutton told him Sedlacko would appear on his behalf; that Sutton would not allow him to testify at the trial; that he participated in several other Legion of Justice break-ins and robberies at Sutton's direction; and that he was paid by Sutton who also represented him on several criminal charges. Defendant testified that he attended Legion meetings with his brother and Sedlacko even though at the trial his brother denied that defendant and Sedlacko were acquainted. Defendant also admitted participating in a robbery with Sedlacko approximately 24 hours after the instant robbery.

Defendant acknowledged he had been in contact with Sedlacko until the latter jumped bail; that he next visited

Sedlacko in December 1974[1]; and that after he learned in March 1975 that his conviction was affirmed, he talked with Sedlacko several times about vacating the conviction. Defendant testified that he did not know until March or April of 1975 that Sutton had allegedly directed Sedlacko to leave the jurisdiction; and that one week before the trial Sutton told defendant's brother not to mention the Legion of Justice.

Co-defendant Sedlacko testified that Sutton placed him in charge of the rectory robbery and supplied four other men for the job, one of whom had the same color of hair and similar build as defendant; that defendant drove around with him to survey the church area; that Sutton planned to have separate trials, trying the defendant first since it was Sutton's belief that the state could not prove defendant guilty, and this would benefit Sedlacko at his trial; that after the robbery he told the police where defendant could be found; that after defendant was arrested, Sutton put up his bond; and that Sutton told Sedlacko to leave the jurisdiction and gave him $2,000 and two sets of identification.

Sedlacko further testified that after he returned to his jurisdiction he met with defendant's attorney and the state's attorney; that he was granted immunity in return for his testimony before the grand jury regarding Legion activities; and that he knew, as did some police officers, that defendant was not at the robbery. Sedlacko's cross-examination was interrupted when the case was continued. Thereafter a motion to strike Sedlacko's testimony by attorneys Busch and Wolfson was allowed. The record does not clearly indicate if Sedlacko's testimony was reinstated.

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[1] It is to be noted that our first opinion was issued November 26, 1974.

Thereafter the state's attorney submitted a confession of error on the grounds that defendant was denied effective assistance of counsel because of Sutton's own participation in the crime and the conflict of interest inherent in his representation of both defendant and Sedlacko. Thereupon the attorney general replaced the state's attorney on behalf of the state.

The trial court denied the petition and at that time indicated that although the state made a confession of error, the court did not consider the same binding upon the court, but rather must consider the facts and the law applicable to the case. The trial court found that attorney Sutton had tried the case vigorously and energetically, that the defendant was aware of Sutton's relationship with Sedlacko and with the Legion of Justice, and that the defendant had a fair trial and the effective assistance of counsel. The trial court further noted that even if defendant's testimony was taken as true, his admissions on the witness stand would make him guilty under the principles of accountability.

While this appeal was pending, the state moved to dismiss the appeal upon defendant's failure to file excerpts pursuant to Supreme Court Rule 342. (Ill. Rev. Stat. 1977, ch. 110A, par. 342.) That motion is pending before this court. Also during the appeal, defendant's attorney Louis Leider died after filing a brief on behalf of defendant. Leave was allowed defendant's present appellate attorney to file a supplemental brief.

I.

A.

We first consider whether defendant is entitled to relief under section 72 of the Civil Practice Act. (Ill. Rev. Stat. 1977, ch. 110, par. 72.) The purpose of a section 72 petition is to permit the vacation of judgments where facts existed which, had they been known at the time judgment was entered, would have prevented its rendition. (*People* v. *Hinton* (1972), 52 Ill. 2d 239, 243, 287 N.E.2d 657; see also *People* v. *Touhy* (1947), 397 Ill. 19, 24, 72 N.E.2d 827.) It must be a fact which influenced the court in its judgment but concerning which the court was in error. (Leighton, *Post-Conviction Remedies in Illinois Criminal Procedure*, 1966 U. Ill. L. F. 540, 566.) It must be demonstrated that the error of fact was not and could not have been discovered at the time of the original proceeding. *People* v. *Jennings* (1971), 48 Ill. 2d 295, 298, 269 N.E.2d 474; *Place* v. *Place* (2nd Dist. 1971), 132 Ill. App. 2d 124, 126, 266 N.E. 2d 170; *Weaver* v. *Bolton* (2nd Dist. 1965), 61 Ill. App. 2d 98, 104-105, 209 N.E.2d 5.

Section 72 is an appropriate remedy where the omission of a valid defense was caused by fraud, duress, or excusable mistake. (*People* v. *Touhy, supra,* p. 24-25; *People* v. *Hinton, supra.*) However, the Illinois Supreme Court has consistently held that in order for a petitioner to avail himself of section 72 relief, he must not only show adequate grounds for relief exist, but also that, through no fault or neglect of his own, the error of fact or the existence of a valid defense was not made to appear at the trial. Such petition is not intended to relieve a party from the consequences of his own mistake or negligence. *People* v. *Jennings* (1971), 48 Ill. 2d 295, 298, 269 N.E.2d 474; *People* v. *Bracey* (1972), 51 Ill. 2d 514, 521, 283 N.E.2d 685.

The record indicates that the only fact not known to defendant at the time of trial was that Sutton allegedly instructed Sedlacko to leave the jurisdiction. Defendant maintains that Sedlacko was to testify in defendant's behalf at the trial. At the hearing defendant testified that both Sutton and Officer Nolan knew he was not present at

the robbery. Yet defendant made no attempt to bring this out at his original trial. Instead defendant chose to rely solely on his family to present an alibi defense which in part was discredited during the instant proceeding.

We find no basis for supposing that the testimony of Sedlacko would have controlled the result in regard to the trial court's finding of defendant's culpability. At trial, two priests, victims of the robbery, positively identified defendant as one of the perpetrators. This identification testimony was carefully scrutinized in the direct appeal.

In a section 72 proceeding, the burden is upon the petitioner to prove his allegations by a preponderance of the evidence. (*People* v. *Touhy* (1947), 397 Ill. 19, 26, 72 N.E. 2d 827; *People* v. *Etheridge* (5th Dist. 1972), 8 Ill. App. 3d 235, 237, 289 N.E.2d 659.) The credibility of witnesses in such proceedings is a matter for the trial court's determination. (*People* v. *Bracey* (1972), 51 Ill. 2d 514, 517, 283 N.E.2d 685; *People* v. *Bermundez* (1st Dist. 1975), 31 Ill. App. 3d 945, 947, 334 N.E.2d 907.) The trial court is not obliged to believe the testimony presented in support of the petition and can properly regard it as improbable or false. *People* v. *Cook* (5th Dist. 1973), 11 Ill. App. 3d 216, 217, 296 N.E.2d 612.

In the present case, it is difficult to imagine that Sedlacko would have testified at trial to defendant's innocence when in doing so Sedlacko would have implicated himself. The reason Sedlacko gave for fleeing the jurisdiction was to insure himself of a better defense.

A reviewing court will not substitute its judgment for that of the trial court unless that judgment was manifestly erroneous since it was the trial court which had the opportunity to see and hear each witness. (*People* v. *Bracey, supra; People* v. *Burton* (1970), 46 Ill. 2d 135, 141, 262 N.E.2d 917.) The petition in the present case is supported by defendant's own testimony and the testimony of his co-defendant, Stephen Sedlacko. No other evidence was offered. The record does not indicate whether Sedlacko's testimony was ever reinstated. The burden is on the appellant to submit to this court a complete record or some explanation for the failure to do so. (Supreme Court Rule 342, Ill. Rev. Stat. 1977, ch. 110A, par. 342.) The record before this court included Sedlacko's testimony. No objection was filed in this court to our considering such testimony. We have examined this testimony in an effort to satisfy ourselves whether there is any basis for defendant's petition. It should be noted that Sedlacko's testimony consists primarily of statements allegedly made to him by Sutton. Sutton at the time of this hearing was dead. In our opinion, based on the entire record before us, defendant failed to present facts necessary to warrant the relief requested.

This brings us to a consideration of defendant's motion under the Post-Conviction Hearing Act.

B.

The Post-Conviction Hearing Act (Ill. Rev. Stat. 1975, ch. 38, pars. 122-1 through 122-7) affords a remedy to convicted persons who claim that in their trial substantial federal or state constitutional rights were violated. (*People* v. *Newberry* (1973), 55 Ill. 2d 74, 75, 302 N.E.2d 34; *People* v. *Derengowski* (1970), 44 Ill. 2d 476, 479, 256 N.E.2d 455.) The remedy is limited to constitutional issues and is not a device to relitigate petitioner's guilt or innocence. (*People* v. *Orndoff* (1968), 39 Ill. 2d 96, 98, 233 N.E.2d 378; *People* v. *McGinnis* (1st Dist. 1977), 51 Ill. App. 3d 273, 276, 366 N.E.2d 969.) As in a section 72 proceeding, the burden of proof is on the petitioner and the credibility of witnesses is for the trial court's determination. *People* v. *Bracey, supra*, at 517.

The amended petition in the present case alleged that the conflict of interest inherent in Sutton's representation of Sedlacko, a guilty person, and of defendant, an innocent person, and of Sutton's involvement in the crime denied defendant his constitutional right to effective assistance of counsel. The petition also alleged that the effect of this conflict upon defendant's innocence was never disclosed to nor fully understood by defendant. The petition further alleged that Officer Nolan's failure to disclose evidence of defendant's innocence deprived defendant of due process of law.

We start with the basic principle that the right to effective assistance of counsel is one of the fundamental rights essential to a fair trial. (*Glasser* v. *U.S.*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680.) This is fundamental in our system of justice.

In support of his petition, defendant relies on the same cases cited by the state's attorney in its confession of error: *Porter* v. *U.S.* (5th Cir. 1962), 298 F. 2d 461; *People* v. *Stoval* (1968), 40 Ill. 2d 109, 239 N.E.2d 441; *People* v. *Meyers* (1970), 46 Ill. 2d 149, 263 N.E.2d 81; *People* v. *Richardson* (4th Dist. 1972), 7 Ill. App. 3d 367, 287 N.E.2d 517. An examination of the facts presented in these cases is warranted here.

In *Porter* v. *U.S.*, defendant was convicted on a charge of violation of Federal narcotics law. His retained counsel was at the time (but this fact was unknown to defendant) attorney for a police officer who was involved in defendant's case. Defendant's counsel refused to call the officer as a witness.

The defendant filed a petition for post-conviction relief alleging that he was denied effective representation of counsel because this evidence was withheld from the jury. The petition was denied without a hearing.

The court found that a hearing on the petition must be held but issued a special caveat that the court was not deciding the merits of the case nor directing any particular action should be taken at the hearing.

The court in *Porter* stated:

> "The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court-appointed. Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others. [Citations.]" (298 F. 2d 463.)

In *People* v. *Stoval* (1968), 40 Ill. 2d 109, 239 N.E.2d 441, defendant was convicted of burglary and theft of a jewelry store. At trial defendant was represented by court-appointed counsel who had personally represented the jewelry store in the past, and his law firm was currently representing the jewelry store. Defendant appealed the conviction on the grounds that he was denied the effective assistance of counsel.

Even though there was no showing of actual prejudice, the court found that the mere possibility of an unwillingness to effectively represent the defendant was sufficient to require the granting of a new trial. Our supreme court stated:

> "[W]e believe that sound policy disfavors the representation of an accused, especially when counsel is appointed, by an attorney with possible conflict of interests. It is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict." (40 Ill. 2d 113.)

In *People* v. *Meyers* (1970), 46 Ill. 2d 149, 263 N.E.2d 81, defendant pleaded guilty to a charge of burglary. De-

fendant was represented by court-appointed counsel who also represented defendant's wife on a possible dramshop action against a tavern where defendant had been drinking prior to the commission of the crime. Defendant filed a petition under the Post-Conviction Hearing Act, contending that his guilty plea was improperly induced, and that he had been denied the effective assistance of counsel.

In reversing the denial of the petition, the supreme court reiterated the holding in *Stoval* and held that where appointed counsel conceivably stood to gain a contingent fee which would be presumably increase with the length of defendant's sentence, representation by that counsel was such a conflict as to require the conviction to be vacated without a showing of prejudice.

The *Meyers* case was followed by *People* v. *Richardson* (4th Dist. 1972), 7 Ill. App. 3d 367, 287 N.E.2d 517, which presented a similar fact situation.

Prior to a murder with which defendant was charged, he had spent many hours in a tavern consuming beer. Before the entry of the guilty plea, defendant's attorney with the approval of defendant, filed a dramshop action on behalf of defendant's minor children.

The court found the *Meyers* case to be controlling and held that there was no need to show prejudice, intentional fraud or misrepresentation, the mere existence of the conflict was sufficient.

From these and subsequent cases, Illinois has adopted a per se conflict of interest rule requiring reversal where there is a showing that defense counsel's past or present commitment to others raises the possibility of an unwillingness or inability to effectively represent a defendant regardless of any actual prejudice being shown. *People* v. *Kester* (1977), 66 Ill. 2d 162, 361 N.E.2d 569; *People* v.

Johnson (1970), 46 Ill. 2d 266, 265 N.E. 2d 869; *People* v. *Grigsby* (1st Dist. 1977), 47 Ill. App. 3d 812, 365 N.E.2d 481; *People* v. *Halluin* (5th Dist. 1976), 36 Ill. App. 3d 556 344 N.E.2d 579; *People* v. *Drysdale* (5th Dist. 1977), 51 Ill. App. 3d 667, 366 N.E.2d 394.

In *People* v. *Coslet* (1977), 67 Ill. 2d 127, 136, 364 N.E. 2d 67, the court speculated that defendant and his lawyer might knowingly and collusively enter into a conflict of interest situation for the purpose of obtaining a reversal if defendant was convicted. However, the court was willing to assume such a risk in order to safeguard one's Sixth Amendment right.

Constitutional rights like other rights may be waived. (*Ciucci* v. *People* (1960), 21 Ill. 2d 81, 84, 171 N.E.2d 34; *People* v. *Pickett* (1973), 54 Ill. 2d 280, 282, 296 N.E.2d 856.) The Illinois Supreme Court has consistently held that when an appeal is taken from a conviction, as it was in this case, the judgment of the reviewing court is res judicata as to all issues actually raised, and all issues which could have been raised but were not, are considered waived. *People* v. *Adams* (1972), 52 Ill. 2d 224, 225, 287 N.E.2d 695; *People* v. *Kamsler* (1968), 40 Ill. 2d 532, 533, 240 N.E.2d 590; *People* v. *McCracken* (1969), 43 Ill. 2d 153, 155, 251 N.E.2d 212; *People* v. *Smith* (1st Dist. 1977), 56 Ill. App. 3d 569, 571, 371 N.E.2d 921.

Commenting on this waiver doctrine, the supreme court in *People* v. *Polansky* (1968), 39 Ill. 2d 84, 86, 233 N.E.2d 374, stated:

> "Granting a defendant one complete opportunity to show a substantial denial of his constitutional rights fully satisfies the fundamentals of due process, and the State is therefore free to choose this method to regulate the procedure of its courts in accordance with its own concepts of public policy and fairness. [Citation.]"

In the present case, unlike the facts presented in *Stoval, Meyers, Richardson,* or *Porter,* defendant's post-conviction petition was not filed until after his conviction had been affirmed. On the appeal, defendant did raise the incompetency of counsel issue but made no mention of the facts now alleged. (*People* v. *Stewart* (1st Dist. 1974), 24 Ill. App. 3d 605, 607, 321 N.E.2d 450.) At the post-conviction hearing, defendant admitted that he knew of Sutton's entire role in the robbery at least as of the time the original appeal was filed. The alleged fact that Sutton instructed Sedlacko to leave the jurisdiction only added to what was already known by defendant of Sutton's involvement.

The waiver rule will be relaxed only where its application would be inconsistent with the concept of fundamental fairness. (*People* v. *Hamby* (1965), 32 Ill. 2d 291, 294, 205 N.E.2d 456.) The rule has not been applied to issues in post-conviction proceedings where the alleged waiver stems from the incompetency of appointed counsel on appeal (*People* v. *Frank* (1971), 48 Ill. 2d 500, 272 N.E.2d 25); where appointed counsel on appeal thwarted defendant's vigorous efforts to raise additional issues (*People* v. *Hamby, supra*); or where the actions of trial counsel deprived petitioner of his right to appeal cognizable issues (*People* v. *Edgeworth* (1st Dist. 1975), 30 Ill. App. 3d 289, 332 N.E.2d 716).

However, fundamental fairness does not require the relaxation of the waiver rule where there is nothing in the record which would excuse the defendant's failure to raise the issues now presented either in the trial court or on appeal. *People* v. *Armes* (1967), 37 Ill. 2d 457, 227 N.E.2d 745; *People* v. *Agnello* (1966), 35 Ill. 2d 611, 221 N.E.2d 658 (where defendant waived issues of a defective indictment, his competency to stand trial, and his constitutional right to defend himself since there was no indication in the record of the original appeal that defendant disagreed with the

presentation made by his appellate counsel or in any way attempted to raise the points which he raised for the first time in his post-conviction hearing); *People* v. *Healey* (2nd Dist. 1974), 23 Ill. App. 3d 214, 318 N.E.2d 89 (where defendant waived issues of his incompetency to stand trial, that his guilty plea was coerced and his trial counsel was incompetent because he failed to show causes beyond his control which prevented the assertion of these issues on direct appeal, and since defendant was represented on direct appeal by different appointed counsel than at trial, he waived the incompetency of trial counsel issue); see also *People* v. *Hill* (1970), 44 Ill. 2d 299, 302-303, 255 N.E.2d 377.

And in *People* v. *Mamolella* (1969), 42 Ill. 2d 69, 245 N.E. 2d 485, defendant was represented by privately retained counsel at his original trial. Several days after the trial, defendant retained another private attorney. After his conviction was affirmed on appeal, a section 72 petition was filed alleging a denial of due process based upon his trial counsel's failure to challenge the legality of a search warrant. The court considered the petition as a post-conviction proceeding.

After applying the waiver rule, the court stated:

> "Such rule is even more binding here where the charges are made through an attorney who had every opportunity himself to raise such questions either on post-trial motion or on direct review. To hold otherwise would only serve to prolong this proceeding interminably." (42 Ill. 2d 73.)

We find nothing in the record before this court that would invoke the relaxation of the waiver rule. Assuming, *arguendo,* that defendant's efforts to raise the issues now presented were thwarted by Sutton at the original trial, there is no showing that defendant sought to raise issues

on his direct appeal other than those actually presented to and discussed by this court. It is to be remembered that on direct appeal an attorney other than the trial attorney represented defendant. In fact defendant does not now suggest any reason why this subject was not raised on the direct appeal. Accordingly, all questions which could have been raised at that time but were not are deemed waived. We find no basis for any relief under the post-conviction act.

C.

The petition, when considered under the provisions of the *Habeas Corpus* Act (Ill. Rev. Stat. 1975, ch. 65, pars. 1 through 36.2) must also be denied.

A court has jurisdiction to release a prisoner on habeas corpus only where the original trial court lacked jurisdiction of the subject matter or person of defendant, or where there has been some occurrence subsequent to the prisoner's conviction which entitles the prisoner to release. (*People ex rel. Lewis* v. *Frye* (1969), 42 Ill. 2d 311, 247 N.E.2d 410; *People ex rel. Skinner* v. *Randolph* (1966), 35 Ill. 2d 589, 221 N.E.2d 279; *People ex rel. Rose* v. *Randolph* (1965), 33 Ill. 2d 453, 456-457, 211 N.E.2d 685.) The remedy is not available to review errors which would render the judgment voidable and are of a nonjurisdictional nature even though a claim of denial of constitutional rights is involved. (*People ex rel. St. George* v. *Woods* (1970), 47 Ill. 2d 261, 265 N.E.2d 164; *People ex rel. Walker* v. *Twomey* (2nd Dist. 1973), 9 Ill. App. 3d 544, 291 N.E.2d 833.) Here no challenge has been made as to the jurisdiction of the trial court nor is there a claim of any occurrence since the judgment of conviction which would entitle defendant to release.

II.

We next consider whether the trial court erred in renouncing the confession of error submitted by the state's attorney.

After the defense rested its case and before the trial court entered its ruling, the state's attorney filed a confession of error. The state concluded that Sutton's representation of co-defendants, Stewart and Sedlacko, was a duplicitous position, and he did not act as a true advocate with respect to defendant's rights. The state's attorney based his position on the fact that Sutton told defendant he had nothing to worry about because Sedlacko, who subsequently admitted committing the robbery in question, would testify at trial that defendant was not there, and while unknown to defendant, Sutton not only advised Sedlacko to leave the jurisdiction but supplied him with the means in form of money and identification. The state's attorney also found uncontradicted evidence of Sutton's involvement in the Legion of Justice, and that he had planned and supplied the personnel for the robbery; that Sutton was protecting his own interests shown by the fact that he instructed defendant's brother to deny any knowledge of defendant's association with Sedlacko; that Sutton supplied Ted Kominsky for the job who bore a strong resemblance to defendant, yet Sutton never called Kominsky as a witness nor disclosed his existence at the trial; that the fact defendant knew of Sutton's participation is not controlling since Illinois law holds one's attorney must be entirely free from any possible conflict; that Sedlacko's testimony that he committed the crime with Kominsky places the identification testimony adduced at trial in question; and that defendant's admission to some participation in the planning aspects of the robbery would not support a conviction based upon another theory of guilt.

The trial court found the confession of error not binding upon its decision on the petition. We agree. Although we feel that the state's confession of error is entitled to great weight, we fail to find any authority which makes such a confession binding upon any court of law.

Illinois courts have consistently held that a confession of error is not conclusive and does not relieve the court of its duty to make an independent determination of the issue. *People* v. *Kelly* (1st Dist. 1965), 66 Ill. App. 2d 204, 209, 214 N.E.2d 290; *People* v. *Colston* (1st Dist. 1967), 81 Ill. App. 2d 75, 77, 225 N.E.2d 801; *People* v. *Fitzgerald* (1st Dist. 1968), 91 Ill. App. 2d 191, 192-193, 234 N.E.2d 79; See also *U.S. ex rel. Marino* v. *Holton* (7th Cir. 1956), 227 F. 2d 886, *cert. den.* 350 U.S. 1006.

It is to be noted that the state in its confession of error made no mention of the fact that defendant failed to raise these issues in his direct appeal when represented by a different attorney.

The trial court correctly held that it was not bound by the confession of error. It then pointed out that defendant's trial counsel tried the case vigorously and energetically; and that defendant was aware of Sutton's relationship with Sedlacko and with the Legion of Justice. We find no error in the trial court's conclusion. In reaching this conclusion based on the aforesaid facts, it is to be remembered that Sedlacko conveniently re-appeared after this court's opinion on the direct appeal became final.

III.

Finally, we consider whether the post-conviction hearing was conducted in such a manner as to deny defendant due process of law.

Non-prejudicial error committed in a post-conviction hearing will not of itself entitle a defendant to relief. *People* v. *Derengowski* (1970), 44 Ill. 2d 476, 481, 256 N.E.2d 455.

Allowing two attorneys who represented non-parties to participate in the post-conviction hearing was at best a most unusual procedure. How an attorney who represents a person who received a subpoena can be permitted to take part in the examination of witnesses is not suggested in the record. No one now seeks to defend such a procedure. Nor can it be defended. This type of procedure is not to be condoned but condemned. While it was error to allow attorneys, appearing on behalf of the Chicago Police Department, a non-party to the action, to participate in the proceedings, we fail to see how defendant was prejudiced. Upon direct examination by defense counsel and cross-examination by the state, testimony concerning Sutton's involvement in the Legion of Justice and his planning the robbery, supplying the personnel, and directing Sedlacko to leave the jurisdiction was brought out. The fact that defendant knew of Sutton's role in the robbery at the time of trial and his direct appeal was also brought out. The attorneys representing the Chicago Police Department primarily elicited impeachment testimony. In view of the basis of our finding in this case and the fact that the purpose of such a proceeding is not to redetermine the guilt or innocence of the defendant, we find no prejudicial error requiring reversal was committed.

IV.

The state filed a motion, which we ordered taken with the case, to dismiss the appeal on grounds that defendant has failed to file excerpts pursuant to Supreme Court Rule 342 (Ill. Rev. Stat. 1977, ch. 110A, par. 342) after being instructed to do so by order of this court. The failure to

file these essential pleadings warrants dismissal. (*Denenberg* v. *Prudence Mutual Casualty Co.* (1st Dist. 1970), 120 Ill. App. 2d 68, 70, 256 N.E.2d 71.) Although we do not condone the failure to comply with the order of this court, we have considered the issues presented. We believe the merit of defendant's issues should be considered. For that reason, we deny the state's motion to dismiss. See *People* v. *Ellis* (1st Dist. 1972), 6 Ill. App. 3d 792, 287 N.E.2d 17 (abst.).

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

PERLIN and BROWN, JJ., concur.

ILLINOIS APPELLATE COURT
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
v.	)	No. 77-13
THOMAS STEWART, Defendant-Appellant.	)	

ORDER

Defendant-appellant's petition for rehearing is hereby denied.

Defendant-appellant's motion to expunge certain statements from the court's opinion of October 17, 1978 is hereby denied; except that the following sentence is hereby deleted from said opinion (page 16, commencing in line 10 through line 13):

> "In reaching this conclusion based on the aforesaid facts, it is to be remembered that Sedlacko conveniently re-appeared after this court's opinion on the direct appeal became final."

/s/ *Robert J. Downing*
Robert J. Downing, Justice

/s/ *Maurice Perlin,*
Maurice Perlin, Justice

/s/ *L. Sheldon Brown*
L. Sheldon Brown, Justice

Dated: November 22, 1978.

(SEAL)

State of Illinois
office of
Clerk of the Supreme Court
Springfield — 62706

January 16, 1979

Mr. Shelly Waxman
Attorney at Law
30 W. Washington Street
Suite 915
Chicago, IL 60602

In re: People State of Illinois, respondent, vs. Thomas Stewart, petitioner. No. 51555

Dear Mr. Waxman:

The Supreme Court today made the following announcement concerning the above entitled cause:

> "The motion by petitioner for an extension of time for filing leave to appeal and that the mandate of the Appellate Court, First District, be stayed or recalled pending disposition of this motion is denied."

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

CLW:cr
cc—Hon. William J. Scott
Hon. Bernard Carey